

Employee Appeals: Procedures

Under Section 67

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of the

EMPLOYMENT

STANDARDS

ACT

R.S.O. 1990,

C.E-14 as Amended

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Office of Adjudication

June 1993



Ontario

What is the Office of Adjudication?

The Office of Adjudication administers the final level of appeal to which Employers or employees may bring their disputes with decisions or orders of employment standards officers. Such appeals are heard by adjudicators (for reviews started by employees, under s. 67 of the Act) or referees (for reviews started by employers under s. 68 of the Act; or for references by the Director of Employment Practices under s. 69 of the Act). Adjudicators and referees are independent decision-makers who hold hearings to review evidence about a particular dispute, then issue a decision which resolves the dispute by binding the parties to that decision.

What Does the Office of Adjudication Do?

The Office of Adjudication processes and arranges for the hearing of employer or employee appeals from decisions of employment standards officers (orders to pay, refusals to issue orders, disputed orders). The Office also processes and arranges for the hearing of references from the Director of Employment Practices. Finally, the Office is responsible for the processing and arrangement of appeals from decisions of occupational health and safety inspectors (see brochure entitled: **APPEALING ORDERS ISSUED UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT**).

Employee Appeals: Procedures under s.67 of the Employment Standards Act

Section 67 of the *Employment Standards Act* permits employees or former employees who are dissatisfied with a decision of an employment standards officer to apply for a review of that decision by an adjudicator. The adjudicator holds a hearing at which all those who could be affected by his or her decision have a right to appear, present relevant evidence, and explain why they think the employment standards officer was wrong or right in the decision he or she made. The adjudicator can uphold the officer's original decision; change the amount found owing by the officer; or he or she can order an employer to pay money to the employee(s). In certain cases (for example, where an employee has been terminated contrary to the "pregnancy and parental leave," the "retail business establishments," or the "lie detector" provisions of the *Employment Standards Act*), the adjudicator can order that the employee be returned to her or his former position (or one like it) and that the employee be compensated for money lost because of the termination. Decisions of the adjudicator are final and binding on the parties to the hearing.

The purpose of this document is to acquaint persons who will participate in hearings before adjudicators with the basic procedures which apply to these applications. **This document is prepared as a guide only, and is not meant to advise persons of their rights in law. For accurate reference, you should refer directly to the *Employment Standards Act*, or consult a lawyer.**

Before the Hearing

All those who might be affected by the decision of an adjudicator in a section 67 application will receive a Notice of Hearing telling them when and where the hearing is to be held. The notice is sent to the employee or employees making the application for review (or their lawyer or other person acting on their behalf); a representative of the employer; and the Ministry of Labour's legal counsel. Notices are normally sent out by courier.

In addition to the Notice of Hearing, the person making the application for review will receive a letter from the Registrar acknowledging the application, a copy of which will also be sent to the employer and the Ministry of Labour lawyer. Also enclosed will be any material the Office has received concerning the application. Normally, this will be a copy of the letter from an employment standards officer to the employee denying his or her claim, and a copy of a letter from the employee applying for review of the officer's decision.

Adjournments

Even though it takes place in a meeting room instead of a courtroom, the hearing is a legal proceeding. If you have information or evidence to present to the adjudicator you must attend the hearing when it is scheduled. If you don't attend, the hearing will go ahead anyway.

Sometimes, however, it is impossible for one of the parties to come to the hearing on the date it is scheduled. Adjournments may be granted **in special circumstances**. The

Registrar of the Office of Adjudication will normally expect a person asking for an adjournment to contact the other parties, see if they consent to the adjournment, and arrange for a new mutually convenient date for the hearing. If all parties do not agree to an adjournment, a request may still be made in writing to the Registrar, and a decision will be made by an adjudicator after the other parties have been given a chance to say in writing why they think the adjournment should not be granted.

If you need an adjournment, you must act as soon as you receive the Notice of Hearing. Otherwise, there will simply not be enough time to process the adjournment request before the hearing, and it will go ahead as scheduled. If you have a reason for seeking the adjournment which comes up at the last minute, you or your agent can come to the hearing and ask the adjudicator to grant an adjournment. **YOU SHOULD NOT EXPECT A HEARING TO BE ADJOURNED UNLESS THERE IS A VERY GOOD REASON.** If you or one of your important witnesses is too ill to attend the hearing, that is a good reason. If the date is simply inconvenient, that is not. If the problem is the availability of a lawyer, the party seeking an adjournment should be prepared to explain why another lawyer from the firm, or in the case of the Ministry of Labour, from their Legal Services Branch, cannot handle the hearing.

Subpoenas

If there is someone you require to attend at the hearing to provide evidence or information to the adjudicator, but you feel this person will not come to the hearing unless he or she is ordered to do so, you can get a subpoena from the Office of Adjudication ordering their attendance and ordering them to bring with them whatever documents you describe in the subpoena. You must ensure that the subpoena is delivered **in person** and is accompanied by the required **payment for attendance**.

Interpreter Services

A party requiring an interpreter for the hearing should contact the Office of Adjudication as soon as possible.

At the Hearing

At the hearing, all parties are expected to attend and to be prepared to present the adjudicator with all the evidence and information which they believe will help the adjudicator understand their position. As the Notice of Hearing makes clear, if a party who is given notice does not attend at the hearing, the hearing may and most times will go ahead without them. If the employee making the application does not attend the hearing, the adjudicator normally will dismiss the application for review. If the employer does not appear, the hearing will proceed anyway — this might mean that the only evidence the adjudicator has to base a decision on will be the evidence of the employee. Thus, if you

have applied for review of an officer's decision, or if you are an employer who is given notice of such an application, you must attend at the hearing or you run the risk of the adjudicator making a decision which goes against you.

Parties should come prepared to present the adjudicator with information regarding the amount of money involved in the application for review: time worked, rate of pay, etc. With this information available at the hearing, the adjudicator will be able to make necessary calculations when writing the decision.

Representation

Employees and employers are entitled to be represented by a lawyer at the hearing, but they don't have to be. They might choose to represent themselves, or to be represented by a person who is not a lawyer but is acting as their agent. The Ministry of Labour is always given notice of the hearing (since it is a decision of the Ministry's employment standards officer which is being reviewed), and is usually represented by a lawyer or a paralegal.

The Hearing

The hearing will convene at the time and place stated in the Notice. The adjudicator will introduce herself or himself, and explain the basic procedure to all those present.

If you are the applicant, you will be asked to make a brief opening statement explaining what you are seeking and why you think the officer was wrong. The Ministry of Labour and the employer, if made a party, will also be given a chance to make an opening statement explaining what their position is.

Unless everybody agrees about what the facts are, evidence will then be presented. This usually will involve the applicant and any witnesses giving a statement, or testifying. Before doing so they will be asked to promise or affirm that all the evidence they give will be true. The applicant or their lawyer/agent should be prepared to ask their witness questions about the evidence the witness is to provide. Any documents which might assist the adjudicator should be presented at this time — examples might include pay stubs, records of employment (separation slips), letters of termination, and anything else you think might be helpful to the adjudicator. Four copies of all documents you wish to use as evidence should be brought to the hearing for the adjudicator and the other parties. The Ministry will then call its evidence, if any, followed by the employer. All parties will have a chance to ask questions of the witnesses called by the other parties (cross-examine them).

Adjudicators have sometimes required employers to present their evidence first, even though the application is made by the employee. This has occurred where the employer terminates an employee believing that the employee was guilty of wilful misconduct. The reason for requiring the employer to go first is that the employer best knows what the specific reasons for terminating the employee were. There might be other circumstances where an adjudicator would not follow the normal order of proceeding, but the most common one will be

where an employee has been terminated and the employer says it was because they were guilty of wilful misconduct.

After all the parties have presented their evidence, everyone is given an opportunity to make final argument, or a closing statement. This is an opportunity to review the evidence and tell the adjudicator what you believe he or she should decide. Usually, the adjudicator will end the hearing and the parties will receive a written decision by mail in due course. Sometimes, the adjudicator will decide the matter orally at the end of the hearing, and issue a decision in writing at a later time confirming that decision.

Role of the Adjudicator

The adjudicator must decide the case based only on information obtained at the hearing. You cannot provide additional information to the adjudicator afterwards, unless you have been requested to do so by the adjudicator and unless the information is also provided to the other parties. You also may not communicate privately with the adjudicator about the case before, during or after the hearing. Even though the hearing might not seem very formal, the adjudicator is acting in the role of judge, and you cannot try to influence the adjudicator's decision except during the hearing with all the other parties present.

The Decision

The decision of the adjudicator is final and binding on the parties to the hearing. That means that if the adjudicator rules that an employer is required to pay an employee a certain amount of money, or pay it to the Director of Employment Practices in trust for the employee, the employer is obliged to pay it; similarly, if an adjudicator rules that an employee is to be reinstated to the position he or she previously held (or one like it), the employer is obliged to comply.

There is no appeal from the decision of an adjudicator except by a process called judicial review which takes place before the Ontario Court of Justice (General Division), Divisional Court.

The Office of Adjudication is not responsible for enforcing the adjudicator's decision. If an adjudicator has ruled that you are entitled to receive money from your employer or former employer, and the employer does not pay it, you should seek assistance from the Ministry of Labour, Employment Practices Branch. A decision of an adjudicator can be turned into a court order for enforcement purposes.

Pre-Hearing Settlement

Disputes may be resolved by agreement of all the parties prior to the hearing. The Ministry of Labour employs individuals called “mediator/advisors” who sometimes contact the parties and assist them in attempting to come to an agreement. The Office of Adjudication is not involved in the settlement process. The “mediator/advisors” have no connection to the Office of Adjudication.

The Office encourages all parties to consider whether a matter can be satisfactorily resolved prior to the hearing.

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